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In The

Supreme Court of the United States

OCTOBER TERM, 1980

No.

KONSKI ENGINEERS, P.C. and JAMES L. KONSKI, P.E.,
Petitioners,

— *vs.* —

ARTHUR LEVITT, COMPTROLLER, STATE OF NEW YORK, and NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondents,

ERDMAN, ANTHONY, ASSOCIATES,
Respondents.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

PETITIONER'S RESPONSES TO ARGUMENTS FIRST RAISED IN RESPONDENTS' BRIEF

Respondents argue that the commencement of contract performance by Konski Engineers, P.C. (hereinafter "Konski"), at a time when it knew that contract approval was delayed in the Comptroller's office constituted an assumption of the risk of a future due process violation by the Comptroller (Br. pp. 4, 5 and 6). This argument is factually incorrect on the Record. Konski did know in the late spring of 1977[1] that for some unknown reason the state's chief fiscal officer had not approved

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[1] Following Konski's March 1, 1977 execution of the contract, it was executed by four separate officials of the Department of Environmental Conservation (hereinafter "DEC") and an Assistant Attorney General prior to its submission to the Comptroller for approval.

the contract *as of that date.* However, it is uncontested in the Record that until well after the Comptroller's final refusal to approve the contract, Konski had no knowledge whatsoever of the reasons behind either the delay or the eventual refusal. Indeed, as is clearly shown in the record, Konski's first possible suspicion concerning the actual basis for the Comptroller's action could only have arisen one week after Konski was informed of that action, *i.e.*, when Konski itself was served with a subpoena duces tecum. Thus, in the late spring of 1977, Konski had absolutely no reason to believe that the approval delay involved any problem related to Konski, as opposed to State bureaucratic, fiscal administrative concerns of some kind.[2]

Further, Konski's reasonable expectation that it would receive the consulting contract for the second phase of the Warner Dam project was not negated by mere knowledge of some kind of temporary tie-up in the Comptroller's office. For prior to said delay, the contracting agency, DEC, had in fact *already awarded the contract to Konski,* had fully executed it as the contracting agency, and had treated it as an existing contractual relationship. Indeed, the statutory authority utilized by the Comptroller to block the Konski contract and debar it from future contracts, New York State Finance Law Section 112, itself recognizes the post-award nature of comptroller contract review:

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[2] Even assuming, *arguendo,* that Konski had known the reasons for the delay all along, the mere commencement of work on the contract cannot possibly be seen as an assumption of the risk that the Comptroller would issue a final refusal to approve the contract, debar Konski from all State contracting, and injure said firm's reputation, without first apprising Konski of specific charges and providing Konski with an opportunity to be heard in its own defense as due process requires.

> "Before any *contract made* for or *by any State Department* shall be executed or *become effective* . . . it shall first be approved by the Comptroller and filed in his office," (emphasis supplied).

Thus, in 1915 *Op. Atty. Gen.* 28,31, Attorney General Woodbury cautioned the Comptroller that:

> "He (the Comptroller) should keep in mind that he is not one of the contracting parties; that the power of making contracts is not taken away from authorized officers and agents of the State by force of this amendment; (and that) . . . his power is not to be used to prevent the execution of the proper functions of other officers and agents of the State."

In short, this case does not involve a rejection of Konski by the State's contracting agency (DEC) based upon any additional discretion provided that agency through the negotiated procurement process. On the contrary, not only did DEC award Konski the contract *following* actual contract negotiations, it also repeatedly refused the Comptroller's request that it in effect reopen the negotiation process to rescind said award even though it had knowledge of the same facts upon which the Comptroller finally acted. Petitioners submit that Konski's expectation of performing contract work for the government was no less reasonable than the contractor's expectation in *Art-Metal-USA, Inc.* v. *Soloman*, 473 F.Supp. 1 (D.D.C. 1978).

Respondent also argues that Konski somehow waived its constitutional right to due process because it made " . . . no formal request for a hearing -- only inquiries". Petitioners submit that such a request is not a recognized condition precedent to the constitutional requirement that states afford its citizens due process of law before depriving them of their right to property or liberty. Moreover, as was stated above, Konski had no knowledge that anyone questioned its responsibility prior to the Comptroller's final refusal to approve the contract. Thus, it had no reason to request a hearing on its reasonable expectation to receive the Warner Dam Contract II until after it was

surprised by the announcement of an already final agency determination. Due process requires a notice of charges and hearing *prior to* any such final determination (See Petition for Writ of Certiorari, pp. 16-18, and the cases cited therein).[3]

In addition, Konski had no reason to suspect that the Comptroller had debarred it from all state contracting until January 16, 1978, more than six months after Konski had been apprised of the Comptroller's refusal to approve the specific contract at issue. At that time the State released its very first explanation of its refusal to approve the contract at issue, the affidavit of Theodore Spatz, Counsel to the Comptroller, filed in support of the State's Answer to initial Petition herein. Said answer and affidavit were served only after Justice Cobb denied the State's motion to dismiss Konski's Petition, rejecting the State's attempt to block any hearing at all in this matter upon the argument that the State had "absolute discretion" in the area of negotiated procurements which precluded any judicial review thereof.

Finally, the State argues that Mr. Spatz's admission in his affidavit that he " . . . advised the Department of Environmental Conservation that *Konski Engineers was under a Grand Jury investigation*," (emphasis supplied) did not deny Konski a liberty interest because " . . . this remark was an accurate statement". Petitioner vehemently rejects this accuracy defense, and submits that the mere service of a subpoena duces tecum or

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[3] A pre-determination hearing would not, as the State suggests, violate the rule of secrecy concerning grand jury proceedings, because the only fact in the possession of the Comptroller was that a grand jury had subpoenaed Konski - related documents from the Comptroller, and that a Special Attorney General had requested the same documents thereafter. Certainly, Konski's knowledge of said "facts" would not have prejudiced the grand jury's function. Indeed, the grand jury subpoenaed the same records, among others, directly from Konski shortly after the Special Attorney General's request (*See* Petition, pp. 11 and 12).

a request for records does not constitute any evidence whatever that the firm whose records are sought is under an investigation of any kind (*See* Petition, pp. 25-27).[4]

Indeed, this assertion by the State represents one in a long series of crafty attempts to indirectly allege some kind of vague, general misconduct on Konski's part by connecting Konski's name with the general purpose of the grand jury investigation at issue. Thus, after stating in his affidavit that Konski was under grand jury investigation, Mr. Spatz stated that " . . . the criminal investigation involved political corruption in the award of public contracts". Similarly, after noting the special prosecutor's request for Konski - related documents at page 3 of its Brief to this court, respondent states that "(T)his prosecutor was conducting a criminal investigation involving political corruption in the award of public contracts". No charges of such corruption have ever been raised by anyone against Konski; no indictments have been issued against said firm, or its president. This kind of trial by *innuendo* is precisely the evil which the due process clause of the 14th Amendment was designed to prevent.

Finally, the State raises a particularly ingenuous argument at p. 9 of its Brief, stating:

> "Petitioners argued below that the Comptroller maintained a complete blanket of silence over his reasons for refusing to approve the contract (see, also, Br. (sic.) pp. 12-13). This is not consistent with Petitioners' publication argument (Br. (sic.) p. 27)."

Actually, Konski has maintained that the Comptroller kept *Konski* in the dark, failing " . . . to acknowledge the relationship between the Andreoli records request and the Comptroller's refusal to approve the Konski contract," (Petition at pp. 12-13). This selective secrecy did not negate the fact of publication to third parties, as alleged in the Petition. Instead,

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[4] Note also the injurious publication to other consulting engineering firms discussed at pp. 22-25 of the Petition.

it only heightened the damage, precluding possible self-help mitigation efforts by Konski, while at the same time hampering judicial review.

CONCLUSION

For the reasons set forth above and in the Petition herein, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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